NO. 2676

United States

Circuit Court of Appeals

For the Ninth Circuit

W. B. PAINE, Trustee in Bankruptcy of the Estate of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

In the Matter of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt.

Brief of Petitioner on Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

G. R. Snider,
T. B. Bruener,
Aberdeen, Washington,
Attorneys for Petitioner.

World Press

NO. 2676

United States

Circuit Court of Appeals

For the Ninth Circuit

W. B. PAINE, Trustee in Bankruptcy of the Estate of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

In the Matter of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt.

Brief of Petitioner on Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

G. R. Snider,
T. B. Bruener,
Aberdeen, Washington,
Attorneys for Petitioner.

STATEMENT OF CASE.

On November 21, 1914, petitioner, Wishkah Logging Company was adjudged a bankrupt in the Dis-

trict court of the United States for the Western District of Washington, Southern Division. Prior and within four months to such adjudication and in the Superior Court of Washington for Grays Harbor County, F. R. Archer, Respondent, was appointed Receiver of the Wishkah Logging Company. On April 1st, 1915, said F. R. Archer, as Receiver in the state court filed his proof of claim in the sum of $256.20 (Tr. pp. 10-11). Subsequent to the adjudication, and on the 16th day of July, 1915, Grays Harbor County, by its Prosecuting Attorney, filed a proof of claim for taxes in the sum of $499.15 (Tr. pp. 12-13). There came into the hands of the Trustee of said petitioner, the sum of $300.00 (Tr. pp. 13-14). Thereafter upon the petition of the Trustee of said bankrupt, the Referee in Bankruptcy, W. H. Tucker, allowed as expenses and costs of administration various amounts, to-wit: the entire amount of the fund which came into the hands of the Trustee (Tr. pp. 17-18). Thereafter, and upon petition for review to the District Court for the Western District of Washington, Southern Division, the claim of F. R. Archer, as Receiver in the State court, in the sum of $256.20, was allowed as a prior and a first charge against the assets in the hands of the Trustee (Tr. pp. 16-17).

It will be seen that the allowance to the Receiver in the state court practically exhausts the entire fund in the hands of the Trustee, and leaves for distribution by the bankruptcy court for expense and costs of administration only the sum of $43.80. It further

appears from the record that the sum allowed by the Referee in the first instance (Tr. pp. 17-18) will exhaust the entire fund, and will leave nothing for the payment either of taxes or the expenses and claim of the Receiver in the state court.

The question is then squarely presented: Does the claim of the receiver in the state court for services beneficial to the estate and rendered within four months of the adjudication of bankruptcy have priority of payment to either taxes legally due and owing, or expenses and costs of administration of the bankruptcy court?

If this question is answered in the affirmative, then the judgment of the lower court is correct; if in the negative, then the judgment should be reversed.

The taxes for which claim is made by Grays Harbor County were due, unpaid and delinquent on property of the bankrupt on and prior to its adjudication as a bankrupt.

The fund was created by a sale in the bankruptcy court, and has never been in possession of the Receiver.

The payment of either taxes or costs of administration will exhaust the fund and the payment of the Receiver's claim will leave less than enough to pay the filing fee, so that the question of priority is squarely before the court in this case.

ASSIGNMENT OF ERROR.

The Court erred in decreeing the claim of the receiver in the State Court superior to taxes.

The Court erred in decreeing the claim of the receiver in the State Court superior to the costs and expenses of administration in the Bankruptcy Court.

ARGUMENT.

The lien of the Receiver was annulled by reason of the adjudication of bankruptcy.

Sec. 67 F, Bankruptcy Act 1898.

"The appointment of a Receiver for an insolvent was an act of bankruptcy, (Sec. 3 (4) Bankruptcy Act 1898, Amended 1903), and it could not have been intended that the very act which put the insolvent into bankruptcy should withdraw the property from distribution."

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1.

State courts do not have concurrent jurisdiction with courts of bankruptcy.

In re Watts & Sacks, 190 U. S. 1.
Loveland on Bankruptcy, 4th Ed. p. 145.
U. S. Fidelity & Guaranty Co. vs. Bray, 225 U. S. 205; 28 Am. Bank. Rep. 207.

The receiver in a state court presents his claim and proves the same as a general creditor and asks that it be preferred. He has only a PROVABLE debt entitled to priority over general creditors.

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1; 190 U. S. 533.
Loveland on Bankruptcy, 4th Ed. p. 145.
In re Rogers, 89 Am. Bank. Rep. 723.
In re Standard Fullers Earth Co. 26 Am. Bank. Rep. 563.

In re Amoratis, 24 Am. Bank. Rep. 567.

In re Goldberg, 16 Am. Bank. Rep. 521.

In re Sage, 35 Am. Bank. Rep. 456 (Advance Sheets).

Section 64, Sub-sections A and B, 1, 2, 3, 4 and 5 set out what claims have priority, and the order of payment. The claim of the Receiver in a state court is placed in Sec. 64 B5.

Collier on Bankruptcy, 10th Edition, page 913.

Loveland on Bankruptcy, 4th Edition, page 1133.

5 Cyc. 386, Note 34, 1913 Cyc. Annotations to same.

Remington on Bankruptcy, Vol. 2, Sec. 2196.

If there is not sufficient funds to pay all priority debts the last class in order abates first.

Collier on Bankruptcy, 10th Ed. 887.

Hence, taxes and costs of administration will be paid before the claim of the Receiver.

Taxes must be paid first:

In re Grenard Lith. Co. 19 Am. Bank. Rep 744.
In re Wiseman, 24 Am. Bank. Rep. 150.

In re Prince & Walter, 12 Am. Bank. Rep 675.

In re Wenatchee Orchard Co. 32 Am. Bank. Rep. 369.

City of Chattanooga et al vs. Hill, 15 Am. Bank Rep. 195.

Guaranty Title & Trust Co. vs. Title Guaranty & Surety Co. 224 U. S. 152; 27 Am. Bank. Rep. 873.

Delahunt vs. County of Oklahoma, 35 Am. Bank. Rep. 157 (Advance Sheets).

Taxes must be paid regardless of security.

Remington on Bankruptcy, Sec. 2163.

"The tendency has been to construe sub-section 'a' as putting taxes in a different and really higher class than the debts enumerated in sub-section 'b'; this is probably the law."

Collier on Bankruptcy, 10 Ed. 889.

The trustee must pay taxes on exempt property:

In re Tilden, 1 Am. Bank, Rep. 300.

In re Baker, 1 Am. Bank. Rep. 526.

The trustee must pay taxes on property relinquished:

Hecox vs. County of Teller, 28 Am. Bank Rep. 525.

Taxes must be paid on property which never came into the possession of the trustee:

City of Waco vs. Bryan, 11 Am. Bank. Rep 481.

A corporation tax due the state, there being no property in the state, is entitled to priority of payment.

New Jersey vs. Anderson, 203 U. S. 484.

Taxes must be paid out of the general fund, though the only one benefited is the mortgagee, purchaser, etc.:

Remington on Bankruptcy, Sec. 2147.

The costs of administration, section 64, sub-division A. 1, 2, and 3, will be paid before the claim of the Receiver in the state court:

In re Rogers, 8 Am. Bank. Rep. 723.

In re Standard Fullers Earth Co. 26 Am. Bank. Rep 563.

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1.

The court below based its decision on the cases of Randolph vs. Scruggs, supra, and in re Chase, 10 Am. Bank. Rep. 677. One of the questions involved in Randolph vs. Scruggs, was whether an assignee had a preference over general creditors, in fact that was one of the particular questions certified. The certificate in that case sets forth the following:

> "The appellants asserted and claimed that each of said items constituted a prior charge upon the assets, and asked to have the same paid by the trustee **in preference to unsecured creditors.**"

This case must be considered in the light of this contention. It only goes so far as to hold that the claimant has a preference, **not a lien,** and as a preference it must be placed under Section 64b5. The precise question at bar was not considered or determined in that case.

In the Scruggs case it is held that the claim of a receiver for professional services prior to bankruptcy may be preferred in the right of an assignee or receiver as against general creditors, but in that case the court says:

"If by declaring the assignment an act of bankruptcy the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be voided as a whole when the trustee takes the goods. The cases which we have cited and others under solvent and bankruptcy laws, evidently take that view. **It follows that the appellant can assert no preference by way of lien under the deed.**"

The opinion in the Chase case, supra, was written, with the exception of the last paragraph or two, before the Scruggs case, supra, was decided, and the part so written is not in accord with that case and is against the weight of authority. It being held in the Chase case that the assignee had a lien under the deed, and Louisville Trust Co. vs. Comingor, 184 U. S. 18, is cited as so holding. The Cominger case only decided that an adverse claimant could not be disposed of summarily, but that there must be a suit to recover.

The case of Standard Fullers Earth Company, supra, involves all the features of the case at bar, except that it does not appear that the payment of either claim would exhaust the fund. The Randolph case was considered therein and held to support the opinion of the court that the cost of administration

must be paid before the claim of a receiver. Cases and authorities are exhaustively set forth.

If it be possible for the insolvent or the state court to incumber an estate within four months prior to the bankruptcy, as the lower court held in this case, the result would be to make the bankruptcy act a dead letter, ineffectual, and of no benefit to insolvents in estates so incumbered where there would not be sufficient additional funds to defray the costs of bankruptcy. It would be possible for every insolvent to charge his estate and possibly prefer a creditor by means of these costs and expenses in the state court.

It is the contention of the trustee in this petition, first, that the necessary expenses in the bankruptcy court are a first and prior charge against the assets and are superior to those incurred and fixed in the state court, and second, that in all events, taxes due the County of Grays Harbor must be first paid. There is some authority for the statement that the trustee is personally liable on his bond for taxes lawfully assessed and not paid, there being sufficient funds realized from the estate to discharge the taxes.

Matter of Monsarrat 25 Am. B. R. 820.

If the trustee's contention regarding the payment of the costs of administration and expenses of bankruptcy is not well taken, we are still firmly convinced that all authority holds that taxes are a first

charge and are prior and superior to any costs or expenses no matter where incurred.

For the reasons above set forth, we think the court above in error, and feel that the case should be remanded with instructions that the receiver's claim be adjudged junior to both taxes and costs and expenses in the Bankruptcy Court.

Respectfully submitted,

G. R. SNIDER.
T. B. BRUENER.